

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS ARYON SHULICK,

Defendant-Appellant.

UNPUBLISHED

March 21, 2006

No. 258741

Charlevoix Circuit Court

LC No. 01-059009-FC

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and sentenced to 30 to 50 years in prison. This Court affirmed defendant's convictions but vacated his sentence and remanded for resentencing.¹ Defendant was resentenced to 25 to 50 years in prison, and appeals as of right. We affirm. This appeal is being decided without oral argument under MCR 7.214(E).

This case arises out of the stabbing death of the victim following an altercation between one of the victim's friends and defendant. Defendant left the scene, procured a butcher knife, and returned, stabbing the victim in the abdomen with a "forceful thrust." The victim was taken to the hospital around 2:30 a.m. The wound was approximately six inches deep, and located near his liver. The victim underwent surgery, but doctors could not stop the bleeding, and he died around 4:00 p.m. Witnesses testified that the victim remained conscious for much of the time before surgery; that he stated a number of times that he thought he was going to die; that he complained of pain; and that he appeared to be in a great deal of pain.

Initially, the trial court sentenced defendant to 30 to 50 years in prison. On appeal, defendant argued that he was entitled to resentencing because the trial court erroneously scored the sentencing guidelines and failed to articulate sufficient substantial and compelling reasons for exceeding the guidelines. This Court found two of the court's scoring decisions to be erroneous. Defendant was initially given a Prior Record Variable (PRV) score of zero points and an Offense Variable (OV) score of 106 points. This Court found that the trial court erred in scoring 25

¹ *People v Shulick*, unpublished per curiam opinion of the Court of Appeals, issued November 4, 2003 (Docket No. 240343) (White, J., concurring).

points for OV 9, MCL 777.39, and directed it to score ten points for this OV. This Court also found that OV 19, MCL 777.49, was improperly scored at ten points rather than at zero points, based on *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002).² Defendant's total OV score should have been 81 points. This score would have placed defendant in an OV level II category, and altered the minimum guidelines range from 162 to 270 months or life to 144 to 240 months or life. This Court noted that the trial court had exceeded these guidelines; however, it declined to address whether the trial court abused its discretion in departing from the guidelines because it could not discern whether the trial court would have departed from the proper guidelines to the same degree. *Shulick, supra*, slip op p 5.

On resentencing, the trial court again found that the guidelines did not adequately reflect the circumstances of the offense, holding that the guidelines did not adequately take into account the extent of the victim's pain, suffering, and knowledge of imminent death. The trial court noted that defendant had, to date, been a model prisoner and determined that this justified a lowered minimum sentence of 25 years in prison.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that a particular factor is objective and verifiable is reviewed as a matter of law, the determination that the objective and verifiable factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Babcock, supra* at 270.

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from a sentencing guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Hendrick*, 261 Mich App 673, 682; 683 NW2d 218 (2004), aff'd in part and rev'd in part 472 Mich 555; 697 NW2d 511 (2005). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Babcock, supra* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *Abramski, supra* at 74. In addition, this Court must review a departure from the guidelines to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock, supra* at 264.

² *Deline* was later overruled in pertinent part by *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004). During resentencing, the trial court acknowledged that *Barbee* overruled *Deline*, but continued to score OV 19 at zero points, based on the law of the case doctrine. Neither party challenges this scoring decision.

Defendant does not challenge the accuracy of the trial court's observations about the evidence, but instead argues that the manner of death and the pain suffered by the victim were already reflected in the guidelines scoring for a number of offense variables: specifically, OV 1 (aggravated use of a weapon), OV 2 (lethal potential of weapon), OV 4 (degree of psychological injury to victim), OV 5 (psychological injury to family of victim), OV 6 (intent to kill), and OV 7 (aggravated physical abuse). Defendant maintains that the trial court could not rely on evidence considered by these variables to enhance his sentence.

We disagree with defendant's argument that the victim's lingering suffering and knowledge of imminent death was adequately reflected in the guidelines scoring.³ Defendant was scored appropriately for the use of the knife and his intent to harm the victim in OV 1, OV 2, and OV 6. MCL 777.31; MCL 777.32; MCL 777.36. OV 5 was scored appropriately to reflect the nature of the psychological injury to the victim's family. MCL 777.35. However, neither OV 4 nor OV 7 adequately covers the instant circumstances. OV 7 is inapplicable because no evidence showed that defendant intended to treat the victim with sadism, torture, or excessive brutality. MCL 777.37. Similarly, adding points to the sentencing range under OV 4 would not have adequately addressed the circumstances presented here. The victim arguably, or even likely, suffered psychological injury that would have led to the need for psychological treatment had he lived. MCL 777.34. However, the variable does not contemplate the severe distress the victim encountered due to his lingering death, his pain, and his fear. The trial court did not abuse its discretion in determining that the guidelines did not adequately reflect the victim's level of suffering here. The reason for departure was objective and verifiable in that the victim's subjective suffering and fear was objectively manifested to others. We find that the extent of the departure did not constitute an abuse of discretion, and that the sentence is proportionate. We affirm the trial court's sentencing decision.

Further, we reject defendant's argument that he is entitled to resentencing under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *People v Claypool*, 470 Mich 715, 731 n 14; 684 NW2d 278 (2004), our Supreme Court held that *Blakely* is inapplicable to Michigan's sentencing scheme, and we are bound to follow *Claypool*. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004).⁴

³ We note that OV 3 (degree of physical injury to victim) should have been scored at 25 points. MCL 777.33; *People v Houston*, 473 Mich 399, 406-407; 702 NW2d 530 (2005). Instead, it was scored at zero points. Even without a rescoring of OV 19 at ten points as discussed above, this change would return the total OV score to 106 and return the offense guidelines scoring to its previous level of III. This fact is not dispositive of the central issue raised here. However, we weigh this fact in deciding whether the level of departure, which would then be two and one-half years rather than five years for an OV II level, is appropriate.

⁴ Our Supreme Court has granted leave to appeal in *Drohan*, limiting its review to whether *Blakely* and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan's sentencing scheme. 472 Mich 881; 693 NW2d 823 (2005).

We affirm.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra